



Coparenting: State Law Standards for Legal Custody and Physical Placement

Prepared by: Margit Kelley, Senior Staff Attorney

When a minor child is involved in an action for divorce, legal separation, annulment, or paternity, a court must determine the legal custody and physical placement arrangements for the child. This issue brief describes the general standards a court uses in determining those arrangements.¹

DETERMINING LEGAL CUSTODY

Legal custody is the decision-making authority for major decisions about a child's life. Major decisions include consent to marry, consent to enter military service, consent to obtain a driver's license, authorization for nonemergency health care, choice of school, and choice of religion.

Presumption for Joint Legal Custody

A court must presume that joint legal custody is in the best interests of a child. Joint legal custody means both parents equally share the right to make major decisions, and neither parent has a superior right over the other for such decisions.²

If the presumption for joint legal custody is challenged, a court must consider the best interests of the child using a number of specific factors that are identified in the statutes, described below. A parent may challenge the presumption for joint legal custody in the following limited circumstances:

- A parent unreasonably refuses to cooperate with the other parent.
- A parent does not wish to have an active role in raising the child.
- A parent is not capable of performing parental duties and responsibilities.
- The parents will not be able to cooperate in the future.
- Conditions exist that would interfere with exercising joint authority.

Other Considerations

The presumption for joint legal custody is reversed if a case involves domestic abuse. If a court finds that a parent has engaged in a pattern or serious incident of interspousal battery or domestic abuse, the court must presume that joint or sole legal custody to that parent is detrimental to the child and cannot be awarded to that parent.³

In determining legal custody for the child of a military service member, a court cannot consider the service member's absence from the home for a call to active duty in the U.S. armed forces.⁴

DETERMINING PHYSICAL PLACEMENT

In contrast to legal custody, which authorizes decision-making on major issues, physical placement is the actual time a child is in a parent's care. A parent must make routine daily decisions regarding the child's care while the child is physically with that parent.⁵

Maximizing Physical Placement

In determining a schedule, a court must consider the best interests of the child. The statutes do not provide a standard placement schedule, but, instead, specify that a schedule must allow a child to have

regular, meaningful periods of physical placement that maximize the amount of time for a child with each parent. Unless physical placement with a parent would endanger a child's physical, mental, or emotional health, a child is entitled to periods of physical placement with both parents.⁶

Other Considerations

A court may not prefer one parent over the other on the basis of the parent's sex or race. A court also may not deny physical placement for a child based on a parent's failure to provide financial support.⁷

If a court finds that a parent has engaged in a pattern or serious incident of interspousal battery or domestic abuse, the safety and well-being of the child, and the safety of the parent who was the victim of abuse, are the paramount concerns in determining periods of physical placement.⁸

Also, as with legal custody, in determining periods of physical placement, a court cannot consider a service member's absence from the home for a call to active duty in the U.S. armed forces.⁹

FACTORS IN DETERMINING THE BEST INTERESTS OF A CHILD

A court must consider the following factors when determining the best interests of a child:¹⁰

- The wishes of the parents.
- The wishes of the child.
- The interaction and interrelationship of the child with parents, siblings, and other significant persons.
- The parents' history of amount and quality of time with the child, and any proposed reasonable lifestyle changes.
- The child's adjustment to the home, school, religion, and community.
- The child's age and developmental and educational needs.
- The mental or physical health of a parent or other person in the household that may affect the child's well-being.
- The need for regularly occurring and meaningful periods of placement to provide predictability and stability for the child.
- The availability of childcare services.
- The cooperation and communication between the parents.
- Whether a parent can support the other parent's relationship with the child.
- Whether there is evidence that a parent engaged in abuse of the child.
- A criminal record, or abuse or neglect of the child or of any other child, by a household member or person in a dating relationship with a parent.
- Whether there is evidence of interspousal battery or domestic abuse.
- Whether a parent has a significant problem with alcohol or drug abuse.
- Reports of appropriate professionals admitted into evidence.
- Any other relevant factor.

¹ The principles governing a court also guide the parties and their attorneys when reaching an agreement for the court's approval.

² ss. 767.001 (1s), (2), and (2m) and 767.41 (2) (a), (am), (b), and (c), Stats.

³ s. 767.41 (2) (d), Stats.; Legislative Council, [Effect of Domestic Abuse in Child Custody Disputes](#), Issue Brief (October 2019).

⁴ s. 767.41 (2) (e), Stats.

⁵ s. 767.001 (5), Stats.

⁶ s. 767.41 (4) (a) and (b), Stats. The Wisconsin Supreme Court has held that "maximizing" does not mean "equal" placement. [*Landwehr v. Landwehr*, 2006 WI 64, at par. 11.]

⁷ s. 767.41 (4) (c) and (5) (am) (intro.), Stats.

⁸ s. 767.41 (5) (bm), Stats.; Legislative Council, [Effect of Domestic Abuse in Child Custody Disputes](#), Issue Brief (October 2019).

⁹ s. 767.41 (5) (c), Stats. To address additional issues, the 2018 Legislative Council Study Committee on Child Placement and Support recommended introduction of the Uniform Deployed Parents Custody and Visitation Act, currently proposed in companion bills [2021 Senate Bill 108](#) and [2021 Assembly Bill 103](#).

¹⁰ s. 767.41 (5) (am), Stats.